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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware corporation dba BLACKWATER WORLDWIDE,

Plaintiff,

v.

KELLY BROUGHTON, in his capacity as Director of the Development Services Department of the City of San Diego; AFSANEH AHMADI, in her capacity as Chief Building Official of the City of San Diego; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO; THE CITY OF SAN DIEGO, a municipal entity; and DOES 1-20, inclusive,

Defendants.

Case No. 08-CV-0926-H-(WMC)

PLAINTIFF'S REPLY TO OPPOSITION TO PRELIMINARY INJUNCTION

Date: June 17, 2008
Time: 10:30 a.m.
Place: Courtroom of the Honorable Marilyn L. Huff

[Declarations of Brian Bonfiglio and Jennifer Chavez and Request to File 17-Page Brief filed concurrently herewith.]

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I. INTRODUCTION

True to form, Defendants' Response to the Court's Order to Show Cause Regarding Preliminary Injunction raises new, never-before-seen arguments that supposedly explain why Defendants (collectively, the "City") attempted to deny Blackwater its Certificate of Occupancy. Initially, the City had questioned Blackwater's occupancy because Blackwater's affiliates and contractors had applied for the facility's permits. Declaration of Brian Bonfiglio in Support of TRO ("Bonfiglio Decl.") ¶ 22, Ex. F. Next, the City stated Blackwater's permits were improper because vocational facilities with target ranges were not allowed without discretionary review by the City Council and CEQA analysis. *Id.*, ¶ 23, Ex. G; ¶ 26, Ex. I. Then, the City argued that Blackwater did not have standing to sue, that no one informed the City of the proposed changed use, and that the City was concerned about the ship mock-up at the facility. TRO Opp., *passim*. Each of those arguments has been abandoned, discredited, or proven incorrect.

Indeed, the Mayor (Doc. No. 13; *see* TRO Hr'g Tr. (Doc. No. 15) 5:1-2), the City's attorney (Tr. 38:11; 32:23), the San Diego Building Official (Bonfiglio Decl. ¶ 27, Ex. J), the City's own inspectors (Bonfiglio Decl. ¶¶ 12, 18, 19, Ex. U) and, most recently, the San Diego Municipal Auditor (Supplemental Bonfiglio Decl. ¶ 2, Ex. 1) have all stated that Blackwater met every requirement for immediate use and occupancy of its Otay Mesa facility. These admissions alone are sufficient to establish that Blackwater has a "strong likelihood of success" on the merits.

But now, the City raises a slew of new arguments—based, in large part, on demonstrably incorrect factual premises—in its efforts to change once again the rules that apply to Blackwater. As an initial matter, this Court can—and should—ignore the City's attempt at revisionist history because there is no evidence that any of these new arguments formed the basis of the City's actions that give rise to Blackwater's claims. But even if the Court were to consider the new arguments, they fail:

- Blackwater is not required to follow more processes before seeking relief from this Court. *First*, there is no authority supporting the City's novel proposition that it must somehow exercise its supposed police power to conduct a discretionary review of the "totality of the circumstances" of Blackwater's Otay Mesa Facility. The San Diego Municipal Code (SDMC) simply does not allow the City to conduct all required inspections, approve all permits and occupancy—only to subsequently claim that more review and approvals are needed. The City had an opportunity to evaluate Blackwater's facility and apply its municipal code to the permitting and inspection process. After doing so, the City approved all of Blackwater's permits and occupancy.[1] *Second*, vocational facilities are permitted as of right in Otay Mesa. There is no authority allowing the City to subject Blackwater to additional "discretionary" review, especially since it is not disputed that other vocational facilities and target ranges were not subjected to such a process. *Finally*, Blackwater need not "exhaust" any remedies because it has already complied with the correct process, and because it seeks relief under 42 U.S.C. § 1983.

- Blackwater's facility is a vocational school, despite the City's irrelevant criticism that Blackwater has not sought state approval to instruct security guards and private investigators. Blackwater's facility trains the men and women of the United States Navy in their chosen vocation. The City itself acknowledges the facility is a "military . . . training center" (Opp. at 7:20), and correctly chose to permit it as a vocational facility. *See* Supplemental Bonfiglio Decl. at ¶ 2, Ex. 1. Blackwater has not sought approval to be a "security and investigative" school because Blackwater's Otay Mesa facility does not train security guards or private investigators; it trains sailors.
- As just about every relevant City official has noted, Blackwater followed all applicable rules for the issuance of its permits and passed all inspections. Once it did so, it was entitled to a Certificate of Occupancy. SDMC § 129.0114 (if requirements are met, the city "shall issue a certificate of occupancy"). Taking away that vested right under the

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[1] That the City has not yet issued a ministerial approval of Blackwater's "partial replica of a ship bulkhead" (Opp. at 9, quoting TRO Order) is a "red herring." Notably, the United States Navy has approved Blackwater's Otay Mesa facility, including its "Range Facility and Ship Simulator Training Platforms," as "safe for the training of Navy students,"and the ship mock-up was always depicted on Blackwater's plans as a future use. (Supplemental Bonfiglio Decl. ¶ 5, Ex. 3)

guise of "more" process, which is not imposed on other applicants, is a due-process violation, as well as an equal protection and dormant Commerce Clause violation.

- This matter is properly before this Court. As an initial matter, the City has not requested that the Court abstain so it need not do so. In any event, abstention is not appropriate. Abstention is only proper when a federal court can avoid a constitutional claim by waiting for a definitive state court ruling on a very uncertain and highly sensitive area of state law. Here, the SDMC and state law are well established and clear. Blackwater only asks this Court, which has diversity jurisdiction, to apply those clear laws fairly.
- The California Government Claims Act does not apply. Section 1983 pre-empts state notice-of-claim laws and money damages are clearly available under Section 1983. Moreover, Blackwater seeks only injunctive and declaratory relief—not money damages—for its claims under the California Constitution. And under state law, the Government Claims Act does not apply when injunctive relief is the primary purpose of the suit, even if money damages are incidentally sought. Thus, the Claims Act is irrelevant to this case.

Preliminary injunctions are meant to preserve the status quo pending a full trial on the merits. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). Ever since Blackwater passed its final inspections, it was entitled to use and occupy the facility—and has now welcomed its first class of U.S. Navy sailors to the facility. There are no reasons to deprive Blackwater of its right to occupy and use its facility—especially in light of the irreparable harm that Blackwater would face. Just as before, the record shows that Blackwater has a strong likelihood of success on the merits, can establish irreparable harm, and that the balance of the hardships tips sharply in Blackwater's favor. Thus, the Court should grant Blackwater's request for preliminary injunction.

II. **BLACKWATER IS LIKELY TO PREVAIL ON THE MERITS DESPITE THE CITY'S NEWLY MINTED ARGUMENTS.**

Both Ninth Circuit preliminary injunction tests require Blackwater to show a likelihood of success on the merits. Blackwater can easily do so *based solely on the undisputed admissions* *of the Defendants and their agents*. The Mayor (Tr. 5:1-2), the City Attorney's office (Tr. 38:11; 32:23), the San Diego Building Official (Bonfiglio Decl. ¶ 27, Ex. J), and the City's own inspectors (Bonfiglio Decl. ¶¶ 12, 18, 19, Ex. U) all correctly concluded in words and deeds that Blackwater met all the requirements for its permits and occupancy.

After the TRO issued, the San Diego City Auditor (the City's chief investigative officer) issued a thorough, definitive report that also concluded that Blackwater properly complied with the permit/occupancy process, and exonerated Blackwater from any wrongdoing. The Auditor's report was the culmination of a process that began with Blackwater taking the extraordinary step of voluntarily providing access to its facility, employees, books, and records to the City's *internal* auditor, even though the municipal auditor has no authority to demand such access. *See* Supplemental Bonfiglio Decl. ¶ 3; San Diego City Charter § 39 (establishing the City Auditor and Comptroller as the chief fiscal officer of the city, with authority to audit *municipal* financial transactions). After a thorough examination, the City Auditor concluded that:

- Municipal law allows contractors and affiliates to apply for permits; thus, Blackwater did not act improperly in having its contractors and affiliates do so. Supplemental Bonfiglio Decl. ¶ 2, Ex. 1 (City of San Diego "Audit of Permits Issued for the Blackwater Facility") at 5.
- Blackwater applied for and was granted four different permits where the proposed use was either obvious or stated on the application. *See id.* at 6.
- Blackwater applied for a San Diego business tax license under its own name, listing its Otay Mesa address, and thus did not mislead City officials about its identity. *Id.* at 7.
- Development Services staff (not Blackwater) properly designated Blackwater's building as a vocational facility, just as Development Services staff had classified other similar facilities with target ranges in the city. *Id.* at 8.
- The municipal code clearly exempts target ranges from discretionary council approval. *Id.* at 11.
- Blackwater properly completed the hazardous materials questionnaire and passed the fire inspection, and in any event, will be using lead-free ammunition at the facility. *Id.* at 12.

- That Development Services (not Blackwater) had lost some records for the facility, predating Blackwater's involvement. *Id.*

These findings—coupled with the admissions and conduct of City officials—establish that Blackwater is likely to succeed on the merits of its claims. Thus, the Court need not even consider the City's new arguments.

There is another reason that the Court need not reach the City's new arguments: there is no evidence that they *actually* motivated the conduct that gives rise to the claims in this case. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 (1993) (in section 1983 cases, defendants must present evidence of genuine, legitimate, non-discriminatory reasons for their actions); *Litton International Dev. Corp. v. Simi Valley*, 616 F. Supp. 275 (C.D. Cal 1985) (indicating "post-hoc rationalization[s] designed to cover up discriminatory motive" are improper). For example, while the City now alleges that Defendant Broughton issued his May 19, 2008 letter because he had decided to proceed with a discretionary review since the warehouse was a military, or "para-military"[2] training center (Opp. at 2:1-4), there is no actual *evidence* that supports that claim. Defendant Broughton's letter does not mention anything the City raises now. And the City's own evidence describes Blackwater's facility as a vocational school—nothing more. *See* Deguzman Decl., ¶¶ 16-18. Thus, the Court should ignore the City's new arguments as an attempt at revisionist history.[3]

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[2] The City repeatedly uses the word "para-military" without defining it. As such, it is unclear to what the City refers, or what relevance it has to this lawsuit. What is clear, in contrast, is that the facility is specifically designed and used only for the lawful and appropriate purpose of training U.S. Navy personnel.

[3] In addition, several other of the City's factual assertions are incorrect. For example, the 1200-square-foot ship bulkhead mockup (which consists of three shipping containers, stacked together) occupies under 2% of the 60,000+ square-foot warehouse floor space – and not 80% as the city alleges. *See* Supplemental Bonfiglio Decl. ¶ 4. The city also claims the facility will train sailors in the use of "shotguns and M-16 rifles." Opp. at 1-2. But as the City's own declarant states, the SRF training program culminates in "certifications in the use of non-lethal weapons, defensive tactics and the employment of the baton, utilization of the oleoresin capsicum (OC) spray, and how to handle and shoot a 9 mm handgun." Trainees at time wear "heavy padding" and trainers "administer classroom quizzes on distinguishing small boats." Deguzman Decl. ¶¶ 16-18.

But even if the Court considers the new arguments, they lack merit, as explained below.[4]

A. **The City Cannot Force Blackwater to Follow Any Additional Processes Before Seeking Relief From This Court.**

The City repeatedly alleges it has not had a chance completely to evaluate Blackwater's facility, and that Blackwater must give it a chance to do so before seeking relief from this Court. *See* Opp. at 5, 7, 9, 11. The Court correctly concluded that vocational/trade schools are permitted uses in Otay Mesa as a matter of right. TRO Order at 7:17-20, citing SDMC § 1517.0301(a)(1); see also *Ex Parte* Application at 13-14 (explaining that vocational/trade schools are permitted uses as of right in the Otay Mesa, under two distinct provisions of the SDMC). And there is no dispute that Blackwater completely complied with the permit and occupancy process.

The City now claims that Blackwater must submit to another process to evaluate the "totality of the circumstances." That concept is invented out of whole cloth. Nowhere does the SDMC provide for some special review if a City official simply "determines" one is necessary under "the totality of the circumstances." Certainly, when asked, the City's attorney could not identify any such requirement (Tr. 35) and the City still cannot do so. Blackwater—like most other applicants—applied for individual, particular permits in accordance with its construction schedule. A homeowner wishing to re-roof his or her house, seeks a permit *for the roofing*—not necessarily for the entire home remodel that is contemplated. There is no provision stating that by adding a new feature or remodeling an existing feature, the City must be given an opportunity to evaluate the entire structure under the "totality of the circumstances." This is because the SDMC is clear: all of Blackwater's permits are subject to only Process One, or ministerial review. *See* SDMC §§112.0501, Diagram 112-05A; 129.0107; 129.0212; 129.0409; 1517.0202(a) (a project is to be approved in accordance with Process One, without requirement for an Otay Mesa Development Permit, if it complies with the planned district ordinance).

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[4] The City's Opposition meanders its way through a number of arguments, often mixing different arguments together under the various headings. To the extent possible, Blackwater has endeavored to group the City's arguments so they are more easily addressed.

Indeed, if all projects in San Diego were subject to retroactive, "totality of the circumstances" review at some point in their future, it would destabilize all ministerial "approvals," and render the city's "Process One" review designation meaningless.

None of the SDMC provisions relied upon by the City (Opp. at 9-10) contradicts this point. The City cites SDMC § 1517.0201(a)(2) for the notion that "a building permit for . . . alteration of an exiting (sic.) industrial warehouse . . . cannot be issued until an application has been submitted stating the *actual intended change of use for the* *entire* *facility*." (Opp. at 6:25-28, emphasis in the original). However, Section 1517.0201(a)(2) says something entirely different: "***Each*** application for a building permit or occupancy permit shall state therein the purpose for which the proposed building, structure ***or improvement is intended to be used***." (Emphasis added.) Thus, by using the word "each," the statute itself contemplates that there will be multiple permit applications. Plus, the permit applicant is given the option of stating the purpose for the building, other structures, *or the improvement*. Each of Blackwater's applications that proposed a novel "improvement" (for example, the target range) stated the purpose for which the improvement would be used. *See, e.g.*, Ahmadi Decl., Ex. C. Thus, Blackwater complied with SDMC § 1517.0201(a)(2).

The City misconstrues other code sections having to do with various stages of the permitting process. For example, Section 112.0103 just states that multiple permits *required* for a single development can be "consolidated for processing." The City's Land Development Manual explains that such consolidation does not apply to Process One approvals, such as those required for Blackwater's facility. Supplemental Bonfiglio Decl. ¶ 6, Ex. 3 (Manual at p. 5, "If more than one type of decision is required for your project, then the decisions are consolidated (***except for Process One Decisions***)") (emphasis added). Even if that code provision applied here, the same section states that the findings on the individual permits must be evaluated *individually*—not in light of the "totality of the circumstances." Likewise, the City's reliance on provisions that allow a building official to halt further development if a law has been violated[5] (Opp. at 10) is misplaced, because Blackwater complied with all applicable SDMC provisions. Otherwise, its final occupancy would not have been approved. *See* SDMC § 129.0114. Tellingly, the City's Auditor did not identify any law that was violated—and neither does the City's Opposition.

The City next argues that it has not yet had a chance to evaluate whether Blackwater's Otay Mesa facility complies with SDMC § 1517.0202(a)(2), which in turn, refers to three other code sections. The first section, 1517.0204, has to do with making sure developers erecting new *residential* facilities fund enough parks and other public facilities before development. That section does not apply to Blackwater's industrial use. The second section, 1517.0301, denotes the permitted uses in Otay Mesa. As already established, Blackwater's facility is a permitted use in Otay Mesa as of right. *See* TRO Order at 7. The third section, 1517.0305, contains property development regulations, such as the minimal street frontage and setbacks, that apply to new building construction. Blackwater built no new building. Thus, these three code sections either do not apply *ab initio*, or have been met—as evidenced by the City's approval of Blackwater's permits and occupancy.

In the same vein, the City disingenuously claims that it has not had an opportunity to exercise its "police power." Even if the City's police powers were somehow relevant, the City *has* exercised it, in drafting its municipal code. *See generally Cooper v. Jevne*, 56 Cal.App.3d 860, 874 n.10 (1976). That code sets forth the requirements for obtaining permits and the right to occupy facilities—requirements which Blackwater followed. Also pursuant to its police powers, Development Services staff scrutinized Blackwater's plans, inspected Blackwater's facility, and ultimately signed off on Blackwater's occupation of the facility. Thus, the notion that the City has not yet had an opportunity to exercise its police powers—even if it were relevant—is simply untrue.

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5 The building official's scope of review is expressly limited to building, electrical, plumbing, and mechanical permit regulations, and not land use determinations. *See* SDMC § 129.0104.

The case law the City cites—*Strickland v. Alderman*, 74 F.3d 260 (11th Cir. 1996); *Landmark Land Co. of Oklahoma v. Buchanan*, 874 D.2d 717 (10th Cir. 1989)—simply stands for the proposition that Fourteenth Amendment cases are not ripe until a local official has rendered a decision with respect to the application of a regulation. *See Strickland* at 265.[6] Here, the City has rendered such a decision when, on May 19, 2008, Defendant Broughton informed Blackwater that the City decided to withhold Blackwater's Certificate of Occupancy. The issuance of a building permit confers a vested right. *See Avco Comm. Developers v. S. Coast Regional Comm'n*, 17 Cal. 3d 785, 791-94 (1976); *see also Bright Development v. City of Tracy*, 20 Cal. App. 4th 783, 798-99 (1993) (vested rights would preclude city from applying new interpretation of ordinance to development). Blackwater's rights vested once the city signed off on all approvals. Thus, Broughton's unambiguous letter was, in and of itself, a final municipal decision that improperly deprived Blackwater of a vested right. *See* TRO Order at 7-10. Just as Blackwater "has standing to assert its federal and state law claims against Defendants" (TRO Order at 5:22-23), its claims are properly before the Court.

For the same reasons, the City's suggestion that Blackwater must first exhaust administrative remedies is also incorrect. The City is unable to point to any specific administrative remedy process that Blackwater was required to exhaust. Subjecting Blackwater to the City's proposed discretionary process, when Blackwater has already complied with all the requirements for occupancy and use, is not an available administrative *remedy*—it is an improper deprivation of rights already vested in Blackwater. And even if it were a remedy, Blackwater was not required to exhaust administrative remedies before bringing its § 1983 claims. TRO Order at 6:19-27, citing *Ellis v. Dyson*, 421 U.S. 426, 432 (1975).

In sum, none of the provisions the City cites, and nothing else in the SDMC, stand for the proposition that the City can inspect a property several times over a six-month period, approve all plans and permits and occupancy, then arbitrarily decide under "the totality of the circumstances" (or some other vague test) not to grant the occupancy certificate mandated by the code. Blackwater has complied with the SDMC and is now entitled to occupy and use the facility. *See Thompson v. Lake Elsinore*, 18 Cal. App. 4th 49, 57-58 (1993) (city has a ministerial duty to issue certificate of occupancy following issuance of building permit); *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1082 (2004) ("a ministerial act is an act that a public officer is required to perform . . . without regard to his own judgment or opinion concerning such act's propriety or impropriety.") The City's refusal to provide an occupancy certificate is an unlawful adverse action, which threatened to injure Blackwater irreparably. Blackwater was justified in seeking relief from this Court and was not required to follow any other processes before doing so.

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[6] Moreover, *Strickland* involved a developer who *had not yet even applied* for a building permit. *See* 74 F.3d at 265-66. And *Landmark Land*, aside from focusing on 5th Amendment takings, has been abrogated not once, but twice. *See Moya v. Schollenbarger*, 465 F.3d 444, 460 (10th Cir. 2006); *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1195 (10th Cir. 1999).

B. Blackwater's Training Center Is a Vocational Facility.

As Blackwater established, its facility is a "vocational school." See *Ex Parte* Application for TRO at 18:20-26 and n. 9.[7] And as the recent audit revealed, the City itself approved Blackwater's facility as "vocational." Supplemental Bonfiglio Decl. ¶ 2, Ex. 1 at 8. Indeed, the City permitted similar training centers as "vocational facilities" throughout the City. *Id*. While the City continues to characterize Blackwater's facility as a "training center" (Opp. at 7:20), it nonetheless argues that it is not a vocational facility because Blackwater has not sought state approval to be a "security and investigative" school to train "registered security guards." Opp. at 8. But Business & Professions Code § 7583.6 applies to security guards and private patrolpersons. Blackwater is training neither; it is training Navy sailors. Thus, section 7583.6 simply does not apply. The City simply cannot pretend that the facility is not *vocational* by referring to an irrelevant code provision, which applies only to one specific *vocation*.

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[7] The Oxford English Dictionary supports the findings of the TRO, defining "vocation" as "[t]he work or function to which a person is called; a mode of life or employment regarded as requiring dedication. A career." SHORTER OXFORD ENGLISH DICTIONARY 3552 (5th ed. 2002). Thus, a location instructing the dedicated men and women who chose a career in the Navy, is a vocational facility.

C. Delaying Blackwater's Occupancy—Even Under the Guise of Providing More Process—Would Violate Blackwater's Property Rights Without Due Process.

"A property interest in a benefit protected by the due process clause results from a legitimate claim of entitlement created and defined by an independent source, such as a state or federal law." *Parks v. Watson*, 716 F.2d 646, 656 (9th Cir. 1983). As shown above, because Blackwater met the requirements of the SDMC and passed all inspections, a right vested in Blackwater (and the City initially approved Blackwater's Certificate of Occupancy). *See* Bonfiglio Decl., Ex. U. As a result, the City was "given little to no discretion regarding whether to grant the permit, [thus], the denial of that permit creates a protectable right." TRO Order at 9:25-26; SDMC § 129.0114 (if requirements are met, the city "shall issue a certificate of occupancy"). A governmental entity cannot refuse to follow the law and deprive a party from a property right interest by attempting to subject the party to endless process. *See generally Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (notice and the opportunity to be heard must be granted at the appropriate time and manner). As this Court has recognized, seeking to deprive Blackwater of its vested property rights by imposing additional requirements and processes itself violates procedural due process. *See* TRO Order at 10:2 (concluding Blackwater has strong likelihood of success on merits of its due process claim).[8]

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[8] This is particularly the case where, as here, there is strong evidence that Blackwater is being treated differently than similarly situated vocational facilities. The City does not—because it cannot—deny that it has not imposed its proposed discretionary, "totality of the circumstances" process on other vocational schools or target ranges. *See* Bonfiglio Decl. ¶ 30. Indeed, a review of City records demonstrated that similar facilities have not been subjected to any discretionary process. *See* Chavez Decl., *passim*.

This disparate treatment of an out-of-state company also violates Blackwater's equal-protection rights and the dormant Commerce Clause. The United States Supreme Court just this week reaffirmed the basis for Blackwater's "class of one" Equal Protection claim in the context of local "government's regulation of property." *See Ex Parte* Application at 18-20. *Engquist v. Oregon Departure of Agriculture*, __ S. Ct. __, 2008 WL 2329768 (U.S. June 9, 2008). Despite several opportunities, the City has failed to address Blackwater's Equal Protection and dormant Commerce Clause arguments, thereby conceding them. *See Day v. D.C. Dep't of Consumer & Regulatory Affairs*, 191 F. Supp. 2d 154, 159 (D.D.C. 2002) ("If a party fails to counter an argument that the opposing party makes in a motion, the court may treat that argument as conceded."). *See also McNeilus Truck and Manufacturing, Inc. v. State of Ohio*, 226 F.3d 429,

(*Footnote continued on following page*)

D. Abstention Would Not Be Proper Here.

Significantly, the City has not asked the Court to abstain here—it has only requested that the Court proceed cautiously. Opp. at 9:15-16 ("federal courts should not lightly intrude"). In any event, abstention would be inappropriate here. Generally, "*Pullman* abstention is an extraordinary and narrow exception" to a federal court's "unflagging duty" to adjudicate a controversy. *Cinema Arts, Inc. v. County of Clark*, 722 F.2d 579, 580, 582 (9th Cir. 1983).[9] A party seeking abstention must show (1) the complaint touches a sensitive area of social policy upon which the federal courts should not enter unless no alternative to its adjudication is open; (2) federal constitutional adjudication can be avoided by a definitive ruling on state-law issues; and (3) the possibly determinative issue of state law is doubtful or unclear. *Smelt v. County of Orange*, 447 F.3d 673, 679 (9th Cir. 2006); *United States v. Morros*, 268 F.3d 695, 703-04 (9th Cir. 2001). The City cannot satisfy any of those elements.

1. There Is No Doubtful State-Law Issue Here.

Even if the City could meet the first two abstention criteria—which is cannot do for the reasons discussed below—the City simply cannot satisfy the third. *Pullman* abstention is only appropriate when the "possibly determinative issue of state law is doubtful." Federal courts should only consider abstaining if "the issues of state law [are] substantially uncertain or ambiguous, necessitating a construction by the state supreme court." *Carreras v. Anaheim*, 768 F.2d 1039, 1043 n.5 (9th Cir. 1985) (citations omitted).

(*Footnote continued from previous page*)

435, 444 (6th Cir. 2000) ("The state gives away the game when it concedes to discriminating against McNeilus's business model. It is precisely the protectionist effect of trying to [affect] McNeilus [an out of state company] . . . that the dormant Commerce Clause proscribes.").

[9] The often-forgotten facts of *Pullman (Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941)) itself attest to its rare applicability. *Pullman* was a pre-civil-rights-era case in which a district court was asked to find unconstitutional a "Jim Crow" law that a Texas state agency had promulgated. Instead of ruling on that sensitive issue, the U.S. Supreme Court ordered the district court to "restrain [its] authority." Because Texas courts had not ruled whether the state agency had the authority to issue the challenged regulation in the first place, the Court concluded that it was more prudent for the federal court to await that determination. *See generally United States v. Morros*, 268 F.3d 695, 703 (9th Cir. 2001).

In the cases the City cites, the federal courts faced truly complex issues.[10] That is not the case here. There is no need for interpretation by the California courts. California law is clear. When an entity meets the requirements for a nondiscretionary permit, a municipality cannot arbitrarily deny that entity its permit. *Inland Empire Health Plan v. Superior* Court, 108 Cal. App. 4th 588, 293 (2003); *Thompson*, 18 Cal. App. 4th at 57-58 (certificate of occupancy was wrongly withheld; "once the building permit has been issued, it cannot be de facto revoked by the simple expedient of never issuing the certificate of occupancy."). The SDMC is just as clear: Blackwater is entitled to use and occupy its Otay Mesa facility. *See* SDMC § 129.0114 (if requirements are met, the city "shall issue a certificate of occupancy.") The Defendants have admitted as much in words and deeds, and this Court and the City Auditor have reached the same conclusion. Tr. 5:1-2; 38:11; 32:23; Supplemental Bonfiglio Decl. ¶ 2, Ex. 1; *Id.* ¶ 27, Ex. J; *Id.* ¶¶ 12, 18, 19, Ex. U; TRO Ruling at 9:7-12. There is simply no uncertain or doubtful legal issue that justifies abstaining in favor of a state-court determination.[11]

2. The Ministerial Act of Issuing a Certificate of Occupancy is Not a Sensitive Social Issue.

As noted above, the City cites several cases where courts concluded uniquely local concerns could include land use *planning* or similarly complex, sensitive, discretionary decisions by a municipality. Significantly, in the cases relied upon by the City, the federal courts abstained rather than substitute their *discretion* for that of a municipality.[12] In those situations, abstention avoids the possibility of "unseemly conflict[s] between two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions." *C-Y Development*, 703 F.2d at 377 (internal quotations and citations omitted).

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[10] *E.g., C-Y Development Co. v. City of Redlands*, 703 F.2d 375 (9th Cir. 1983) ("Delicate issues of land use *planning*" required abstention; *Kollsman v. City of Los Angeles*, 737 F.2d 830, 834 (9th Cir. 1984) ("interlocking statutory provisions enacted during the course of the litigation."); *Bank of America National Trust and Savings Association v. Summerland County Water District*, 767 F.2d 544 (9th Cir. 1985) (complex water rights).

[11] Even if the laws here were ambiguous—and they are not—it would be perfectly permissible for the Court to apply statutory construction principles to the laws instead of abstaining. *See Cinema Arts*, 722 F.2d at 581.

[12] *See Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 841 (9th Cir. 1979) (declining to determine whether a city council's discretionary, legislative actions were an abuse of the city's discretion).

In contrast, there is no "sensitive social policy" at issue here and Blackwater does not ask the Court to substitute its discretion for the City's. Instead, it merely asks the Court, sitting in diversity, to apply the City's own laws, which clearly required the ministerial step of issuing a Certificate of Occupancy. Those wishing to make this a political matter cannot "implicat[e] sensitive social policies" by using the case as an opportunity to express anti-war sentiment. Blackwater is not asking this Court to rewrite or overturn a sensitive state law—it is asking the Court to *enforce* a well-established, noncontroversial one. Thus, astention simply is not appropriate here. *See United States v. Morros*, 268 F.3d 695, 704 (9th Cir. 2001) (declining to abstain because "it is clear that the [state official's] decision not only comports with [state] law, but is in fact dictated by it."); *Cf. Pullman*, 312 U.S. 496 (declining to rule on segregation law); *Cf. Smelt*, 447 F.3d at 681-82 (declining to rule on federal constitutionality of California's marriage laws because same sex couples' challenge to same laws was pending in state court on state constitutional grounds).

3. A Determinative State Court Ruling Would Not Obviate the Need for Federal Adjudication, Because Blackwater Implicates This Court's Diversity Jurisdiction.

The City also cannot satisfy the second *Pullman* criterion. As noted, Blackwater does not invoke this Court's jurisdiction based solely on federal constitutional claims. The Court also has diversity jurisdiction. At the simplest level, Blackwater seeks the protection of the federal court system to avoid parochialism and local political bias.[13] Under *Erie v. Tompkins*, 304 U.S. 64 (1938), the Court must apply relevant state law; *i.e.*, primarily the SDMC. This Court could resolve this case by simply applying those laws, which clearly required the ministerial act of issuing Blackwater its Certificate of Occupancy. Thus, there is no need to reach Blackwater's constitutional claims—though the Court certainly can do so under § 1983. The "extraordinary and narrow" *Pullman* abstention doctrine cannot be used to eviscerate diversity jurisdiction, lest the narrow exception swallow a well-established rule. As the U.S. Supreme Court has recognized, "due respect [must be given] to a suitor's choice of a federal forum." *Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

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[13] Our founders recognized that federal judges, appointed by the President and serving for life, would be far less unsusceptible to the local political pressures than state courts might be.

The legal questions are clear and there are no sensitive issues of social policy here, making abstention completely inappropriate.[14]

III. BLACKWATER HAS ESTABLISHED THE RISK OF IRREPARABLE HARM.

The City argues that Blackwater's harm is not irreparable because it amounts to only money damages that can be pursued through the Government Claims Act. The City is wrong for several reasons. First, Blackwater's harm is not limited to money damages. The City ignores that its violation of Blackwater's constitutional rights itself constitutes irreparable harm. This Court already correctly concluded that Blackwater has a "strong likelihood of success on its constitutional claims" and correctly that "most courts do not require further showing of irreparable injury." TRO Order at 10:15-16.

Second, the City ignores the severe reputational harm that likely would result if the City were allowed to expel Blackwater from the Otay Mesa facility. *United Healthcare Ins. Co. v. AdvancePCS* , 316 F.3d 737, 741 (8th Cir. 2002) (damage to reputation can constitute irreparable injury, especially if damages would be uncertain or inadequate). The City also ignores that Blackwater also "faces the threat of being unable to fulfill an important training contract with the United States Navy." TRO Order at 10:20-21.

Third, the Government Claims Act does not apply. The California Government Claims Act requires plaintiffs to first follow a claims process before seeking money damages from a public entity or employee. Cal. Gov't. Code §§ 901, 912.4, 912.8, 945.4. But the process does not apply to claims brought under 42 U.S.C. § 1983. "A civil rights plaintiff cannot be required by state law to give a prospective defendant 'notice' of an intention to sue because § 1983, which exists to vindicate important federally created rights, preempts state notice-of-claim statutes. . . . All state notice of claim statutes are preempted . . . ." *Ellis v. City of San Diego*, 176 F.3d 1183, 1191 (9th Cir. 1999) (quoting *Felder v. Casey*, 487 U.S. 131, 153 (1988)); *see also Owen v. City of Independence*, 445 U.S. 622 (1980) (city could not rely on governmental immunity or notice-of-claim laws because section 1983 abrogated them). Moreover, where—as here—the primary purpose of the action is to obtain injunctive and declaratory relief, the Claims Act does not act as a barrier to judicial review. *M.G.M. Constr. Co. v. Alameda County*, 615 F. Supp. 149, 151 (N.D. Cal. 1985) ("the notice of claims provision should not apply to this suit since the primary relief sought is a declaration that the County's affirmative action program violates state law); *Snipes v. City of Bakersfield*, 145 Cal. App. 3d 861 (1983) (notice act does not apply to cases where injunctive relief is the primary reason for suit, even if money damages are an incidental). Thus, the Claims Act is irrelevant to this litigation.

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[14] Even when all abstention elements are met—and even when a case involves land-use issues—district courts can exercise their discretion and decline to abstain, weighing the significance of the issues. *In re Eastport Associates*, 935 F.2d 1071, 1077 (9th Cir. 1991) (citing *Shamrock Dev. Co. v. City of Concord*, 656 F.2d 1380, 1384-85 (9th Cir. 1981)). Here, as noted, Blackwater invokes this Court's diversity and federal question jurisdiction in large part to avoid parochialism and the local political process. For these reasons and others discussed above, the Court would be justified in simply exercising its discretion in refusing to abstain.

IV. THE BALANCE OF THE HARDSHIPS FAVOR BLACKWATER.

Despite having ample opportunity to do so, the City is tellingly unable to identify any harm to the City if Blackwater continues occupying and using the Otay Mesa Facility. Thus, the threatened injury to Blackwater, including but not limited to violations of federal constitutional rights that Defendants concede,[15] clearly outweighs the "little to no damage or hardship" faced by the City. TRO Ruling at 11:5-6.

The City argues that public policy favors allowing the City to exercise review of Blackwater's proposed use. Opp. at 15:19-22. But the City already has done so. Blackwater disclosed to the City that it proposed to use the facility as a vocational school with a target range and the City approved that use, and approved Blackwater's occupancy. The public interest now favors the City's adherence to the rules without imposing additional and improper requirements

[15] *See* footnote 8, *supra*.

on Blackwater. Both this Court in its TRO and the Navy have properly concluded that this facility confers a public benefit as opposed to any public harm.

V. CONCLUSION

For the foregoing reasons, Blackwater respectfully requests that the Court enter a Preliminary Injunction that enjoins the City and its agents from interfering with Blackwater's right to occupy the Otay Mesa Facility and use that property consistent with the permits and Certificates of Occupancy that the City already granted. The Court should also continue its order that the City and its agents promptly and properly process any currently pending ministerial permits for the Otay Mesa Facility.

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